Supreme Court, U.S.
FILED

09-397 SEP 28 2009

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

ANDRE S. HENLEY,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES GEORGIA'S FELONY MURDER RULE VIOLATE A DEFENDANT'S RIGHTS TO DUE PROCESS OF THE LAW AND TO A FAIR TRIAL BY AUTHORIZING A JURY TO PRESUME THE INTENT TO KILL COMMENSURATE WITH THE INTENT TO COMMIT A FELONY?

II. DOES A TRIAL COURT VIOLATE A DEFENDANT'S RIGHT TO DUE PROCESS, HIS RIGHT TO A FAIR AND IMPARTIAL JURY AND/OR HIS RIGHT TO A FAIR TRIAL WHEN, ON A MOTION FOR NEW TRIAL, IT DECLINES TO CONSIDER THE SUBSTANCE OF AN AFFIDAVIT ALLEGING JUROR MISCONDUCT?

III. DOES A TRIAL COURT VIOLATE A DEFENDANT'S RIGHT TO DUE PROCESS, HIS RIGHT TO A FAIR AND IMPARTIAL JURY AND/OR HIS RIGHT TO A FAIR TRIAL WHEN, IN DIRECT CONTRADICTION OF STATE AND FEDERAL CONSTITUTIONAL REQUIREMENTS, IT REFUSES TO HOLD A HEARING REGARDING ALLEGATIONS THAT JURORS INFUSED EVIDENCE NOT ADDUCED AT TRIAL INTO JURY DELIBERATIONS, THEREBY PERSUADING A MAJORITY OF THE JURORS TO CHANGE THEIR VOTES AND CONVICT THE DEFENDANT OF A CAPITAL FELONY?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

There are no parties to the proceedings other than those listed in the caption.

The Petitioner is Andre Henley

The Respondent is the Government of the State of Georgia

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PETITION FOR A WRIT OF CERTIORARI

Henley files this petition for a writ of certiorari seeking an order vacating the June 8, 2009, order of the Georgia Supreme Court and subsequent denial of reconsideration on June 30, 2009. *See Henley v. State*, 678 S.E.2d 884, 285 Ga. 500 (Ga. June 8, 2009)

REPORT OF THE OPINION OF THE GEORGIA SUPREME COURT

The opinion of the Georgia Supreme Court for this case is reported at *Henley v. State*, 678 S.E.2d 884, 285 Ga. 500 (Ga. June 8, 2009) (App 1). The Court's order denying reconsideration is unreported. (App. 35).

STATEMENT OF SUPREME COURT JURISDICTION

Petitioner is requesting that the Court review a decision of the Georgia Supreme Court. This Court's jurisdiction to review the decision is conferred by 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Amendment V. Rights in criminal cases

> [n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI. Right to a fair trial

> [i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of

male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF PROCEEDINGS AND DISPOSITION

Henley was indicted by the DeKalb County Grand Jury on July 13, 2006. (App. 38). The indictment charged Henley with two counts of murder (O.C.G.A. §16-5-1) and aggravated assault (O.C.G.A. §16-5-3). (App. 36). Henley pled not guilty and had a jury trial in the DeKalb County Superior Court, the Honorable Gregory A. Adams presiding, from February 26, 2007, to March 6, 2007.

During its instructions to the jury, the trial court charged as follows regarding the crime of murder:

> [a] person also commits the crime of murder when, in the commission of a felony, that person causes the death of another human being. Under the laws of Georgia, aggravated assault is a felony and it is defined as follows: a person commits the offense of aggravated assault when he assaults another person with a deadly weapon. An assault is an attempt to commit a violent injury to the person of another.
>
> A person commits the offense of aggravated assault when that person assaults another person with a deadly weapon. To constitute such an assault, actual injury to the alleged victim need not be shown. It is only necessary that the evidence show beyond a reasonable doubt that the defendant attempted to cause a violent injury to the alleged victim. (T. 1035-1036). (App. 45-47).

Henley objected to the court's instruction regarding felony murder, but the trial court overruled the objection. (T. 926-927). (App. 43-45). On appeal, the Georgia Supreme Court found that the instruction was, "the suggested pattern jury charge, which is itself based on the felony murder statute," and affirmed the trial court's ruling on Henley's objection. *Henley v. State*, 678 S.E.2d 884, 891, 285 Ga. 500 (Ga. June 8, 2009).

The jury found Henley guilty on all charges. The trial court sentenced Henley to the statutorily-required sentence of life in prison. *See* O.C.G.A. §16-5-1. Henley filed a timely motion for new trial on March 28, 2007, which was then amended and particularized on February 8, 2008. As part of his amended motion, Henley submitted the affidavit of Dr. Francisco Cruz, who was a member of the jury in Henley's case. (App. 48-49). In his affidavit, Cruz stated that members of the jury had, outside of the courtroom and not during the presentation of evidence, observed Henley driving a Honda Accord and also heard him referred to as, "Blood." *Id.* Cruz asserted that the questions of Henley's being referred to by the name, "Blood," and his car being a Honda Accord were critical to the jury's deliberations and that the extrinsic evidence persuaded multiple jurors, including himself, to vote to convict Henley. *Id.*

When the matter of the affidavit arose at the trial court's first hearing, on February 11, 2008, counsel for Henley specifically stated that he intended to argue the matter *that day* and, in fact,

stated, "the only issue that I think we need to flesh out in the amended motion for new trial is the issue of juror misconduct." (Motion for New Trial Hearing 2/11/08, ("M."), at 3). In response, the state requested a continuance:

> really the only issue we're talking about here today is the affidavit. If Your Honor is inclined to admit the affidavit, of course we don't have the original here that is apparently being tendered. But if Your Honor is inclined to admit it, then the State would request a continuance so we would be able to flesh this issue out. (M. 5).

Henley did not object to a continuance, but insisted on a hearing on the misconduct issue:

> I understand this is coming late[1] to the State. It's my position, Judge, that a hearing is required to be had by the Court once a *bona fide* showing of irregular juror conduct is shown.[2] If the State wants to have a hearing and wants time to prepare for that hearing, I am not really in a position to oppose it since we filed the affidavit on Friday afternoon. (M. 6).

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[1] There is no statute or court rule in Georgia mandating the time deadline for filing an amended motion for new trial.

[2] Henley proposed that Cruz's affidavit had established that *bona fide* showing of misconduct, i.e. infusion of extrinsic evidence vis-à-vis unsworn testimony, such that he understood that the Motion for New Trial Hearing would serve as the hearing he was referencing.

The trial court then stated, "I'm going to take this matter off of my calendar. I'm going to give the State an opportunity to research it. We will set it down for a date and time certain." (M. 6). A colloquy ensued about the logistics of the continued hearing. The state noted, "[i]f we're going to have evidence heard on this, I'm going to need to talk some [sic] of these supposed other jurors." (M. 7). Henley's counsel again insisted on a hearing:

> [t]his juror contacted me, contacted us. I didn't reach out to contact the juror. I think a hearing is required on this matter to flesh out the allegations contained in this affidavit. I also think that once the affidavit is considered and once we have this testimony from Dr. [sic] Cruse, the presumption in favor of the defendant and the burden falls on the state. (emphasis added) (M. 7).

Counsel then suggested to the court that it take responsibility for subpoenaing the remaining jurors, lest the process of both sides' investigators interviewing them become burdensome to the citizens who had sat on that jury. (M. 8).

The court continued the hearing, informing the parties that it would give them ample time to submit written motions and briefs on the issue to the court and to subpoena any witnesses they deemed necessary to attend the hearing and provide evidence. At no time prior to the conclusion of the hearing did the court suggest, hint, intimate, directly state or in any way communicate to Henley that he bore the burden

of producing Cruz, who had already provided an affidavit which, under any known Georgia law, was admissible in a motion for new trial hearing. *See Dickens v. State*, 627 S.E.2d 587, 590 n. 2, 280 Ga. 320 (2006). The trial court took *no position* as to the admissibility of the affidavit at the first motion for new trial hearing.

The trial court held a second motions hearing on June 24, 2008. (Second Motion for New Trial Hearing, ("N.") at 1). Because the trial court never took a position on the affidavit, both parties were tenuous as to how to proceed. Mirroring the state's position from the first hearing, counsel for Henley stated, "[i]f the affidavit is sufficient, we are ready to go. If the Court finds that it is not sufficient, we are not ready." (N. 2). Although the state announced that it was ready, its position was, in reality, *the mirror opposite of Henley's*: "[i]f you admit the affidavit, – I filed a motion to obtain contact information for the trial jurors," later stating that it had done so, "a week and a half or two weeks ago." (N. 2). Giving the state the benefit of the doubt as to its estimation of when the motion was filed, it filed the motion to get the juror information almost one hundred twenty days after it asked the trial court for time to take that action. Thus, even though the state said it was ready, had the court indicated its inclination to admit the affidavit as testimony at the hearing, it was abundantly apparent that the state was requesting additional time to round up jurors to oppose the affidavit, a burden the

trial court made clear was *the state's* at the prior hearing. (M. 10).

When the hearing proceeded, the state conceded that an affidavit was an appropriate form of evidence for a motion for new trial, but nonetheless asserted that Cruz's affidavit was inadmissible. (N. 10). *See Dickens*, 627 S.E.2d at 590, n. 2. The state argued that, because a Georgia statute governing state *habeas corpus* cases requires contact information to be included in affidavits, Cruz's affidavit should as well and, because it did not, it should be stricken. (N. 10). The state further requested that, "if [the court was] inclined to admit the affidavit . . . the State should at least have the opportunity to contact the trial jurors, find out if this is credible and be able to call them as witnesses in a proceeding." (N. 11). Thus, although it had possession of the affidavit from the time of the first motions hearing, the state argued that, because it had filed a motion with the court to disclose juror information *less than two weeks prior*, were the court inclined to consider the affidavit *it* would be entitled to a continuance to interview jurors. (N. 12). Henley's response was, "[a]s far as the State not being able to get the contact information, I understand where their position is. However, you know, we obviously didn't have a problem with that. I don't have a problem with him interviewing Dr. Cruz at the time if and when he arrives." (N. 15, 17).

The trial court then indicated that it would not admit the affidavit, contrary to any published law or rule in the State of Georgia, based on, among other

things, the lack of contact information contained in the affidavit. Henley then requested a continuance to produce Dr. Cruz, which the trial court denied. (N. 16-17). In its written order denying admission of the affidavit, the trial court made numerous findings of fact, and acknowledged that it was, "authorized to consider the affidavit, but, in the exercise of its discretion, finds that the affidavit of the trial juror is not *admissible*." (emphasis added) (App. 25). The court expounded upon its ruling in its order denying Henley's motion for new trial. (App. 20-23). Its specific grounds for finding that the affidavit was, "not admissible at the motion for new trial hearing" were:

- "[t]he juror contacted [defense counsel's] office before the first motion for new trial hearing and executed an affidavit four days before the February 11th hearing;"
- "[t]he affidavit did not contain the contact information for the juror who purportedly executed the affidavit and the juror contact information is not available to either party from the jury management officer without a court order" and
- "[t]he [sic] alleged juror was also not present at the motion for new trial hearings on February 11 and June 24 and the defense did not provide an explanation for his absence." (App. 20-23).

Thus, concluded the trial court, the "purported affidavit of the trial juror is not admissible," and it declined to consider the affidavit's substantive contents. *See also Henley*, 678 S.E.2d at 887.

In *dicta*, the court distinguished its concerns about the form – and therefore the *admissibility* of the affidavit – with its own concerns about substance – and therefore the *credibility* – of the assertions therein. (App. 21-22). The court expressed concern that Cruz was not the individual who observed Henley's being called, "Blood," or what car he drove, nor did Cruz, "know or remember how many people allegedly saw this, if they were the same people who saw each incident, or even the gender of the alleged observer(s)." *Id.* The court, again in *dicta*, also questioned the affidavit based on the time frames provided therein. Specifically, it held:

> [t]he first day of deliberations was Friday, March 2, 2007. After the jury had deliberated for about two hours, the Court released them for the weekend. The court instructed the jury to return to the courtroom and begin deliberating no later than 8:30 a.m. on Monday, March 5, the day the alleged observations were allegedly reported to the jury, according to the affidavit. As is the Court's usual practice, the jury was then escorted from the courtroom by the bailiff. The parties and the lawyers were required to remain in the courtroom until the deputy who had escorted the jury away from the courtroom had returned. The Court instructed the

> parties and the lawyers that they should return to the courtroom at 10:00 a.m. on Monday, March 5, one and a half hours after the jury was required to return. These circumstances make it highly unlikely that 'one or more of the jurors' would have been in a position to observe the Defendant doing the things alleged in the affidavit during their deliberations. (App. 22).

It is important to note that the trial court and the parties never reached the point of arguing about these credibility concerns during consideration of the issues because of the trial court's decision not even to admit the affidavit for consideration of its assertions. (App. 22). Henley will address the details of these credibility concerns, *infra*.

Henley filed a timely Notice of Appeal on July 22, 2008, and the case was docketed in the Georgia Supreme Court on November 5, 2008. The Georgia Supreme Court observed that the trial court had the power to consider the substance of the affidavit, but also noted that the court, "declined to do so." *Henley* at 888. The Court proceeded to obliterate the line which the trial court had carefully drawn between the procedural aspects of the affidavit, which were considered, and the substantive aspects, which were not reached, broadly concluding, "there are sound reasons to question the averments of the defense's eleventh hour, bare bones affidavit:"

> [f]irst, the defense made a conscious decision not to have the affiant testify in open court

> where the State could cross-examine him and his credibility could more readily and more definitively be evaluated by the trial court. Second, the defendant elected not to include contact information in the affidavit so that the State could speak to the juror and decide for itself whether he was telling the truth. Third, according to the defendant, the juror approached defense counsel out of the blue, almost a year after the trial but just four days prior to the first hearing on the motion for new trial, to execute the affidavit, a coincidence of timing that even the most credulous judge would have trouble accepting at face value. Fourth, the affidavit deliberately omitted information necessary to verify its arresting allegations, including the names of the jurors who supposedly brought in the extrinsic information, the number of jurors who did so, and even their gender. Fifth, the trial court found, and our own review of the record confirms, that the time line in the affidavit does not sync with the comings and goings of the jurors and the defendant at trial as reflected in the transcript. *Henley* at 888.

Describing the affidavit's allegations as, "startling and, if accurate," the court suggested that they, "would call into question the basic fairness of the defendant's trial and the fundamental reliability of the defendant's conviction." *Id.* The court nonetheless doubted the credibility of the affidavit, and therefore ruled that the trial court did not abuse, "its discretion

in declining to consider the juror affidavit in ruling on the defendant's motion for new trial." *Id.*

The Georgia Supreme Court affirmed Henley's convictions on June 8, 2009, denying his subsequent motion for reconsideration on June 30, 2009. *See Henley, supra.*

STATEMENT OF FACTS

The present matter arises from an incident which took place on or about April 7, 2006, when an individual named Menes Kori Tripp was shot and killed in the parking lot of a church in DeKalb County.

Testimony at trial alleged that Tripp and his brother, Justin Neason, had arranged to meet Henley to allow Tripp to inspect some marijuana that Henley allegedly had to sell. (T. 437). Neason testified that he dropped Tripp at a location where Henley would meet him so that they could inspect the drugs and was supposed to pick his brother up some time afterward. (T. 441). About forty-five minutes after dropping Tripp off, Neason contacted him to find out if he should come pick him up. (T. 442). When Neason arrived to pick his brother up at the Bethesda Cathedral, a church in DeKalb County, a car approached his and, according to Neason, fired gunshots at Neason's car, chased Tripp and eventually shot and killed him. (T. 445). Neason – but

no other witness – identified Henley, who allegedly went by the nickname, "Blood,[3]" as the driver of the vehicle that was firing on Tripp and his car. (T. 441; 445). The identity of the individual driving the vehicle that fired at Tripp and his car was a key issue in the trial and one which was contested by Henley throughout. Neason admitted that he and a friend, Jamaal Parker, drew guns of their own and began firing at the car which was chasing Tripp. (T. 446-447). According to the two participants in the gunfight, the car was a, "gray brownish Honda Accord," at this gunfight. (T. 434). No other witnesses confirmed either of these facts.

Following a police investigation, Henley was arrested and charged with Tripp's murder. Henley's jury trial took place from February 26, 2007, to March 6, 2007, at the end of which he was convicted on all three counts.

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[3] Henley moved *in limine* to exclude use of the prejudicial nickname, "Blood," during the trial, but the trial court denied the motion. (T. 340-342).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I. Certiorari is warranted because the trial court violated Henley's right to a fair trial, his right against double jeopardy, his right against cruel and unusual punishment and his right to due process of the law when it instructed the jury that it was authorized to convict Henley of murder without the finding of an intent to kill in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), this Court held, "explicitly [] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *See also* U.S. Const. Amend.s V & XIV. In *Sandstrom v. Montana*, 442 U.S. 510, 520-521, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), this Court affirmed this protection as to conclusive presumptions. *See also Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004); U.S. Const. Amend. VI.

Georgia's Supreme Court has previously held that the offense of felony murder is legally indistinguishable from the offense of malice murder,

"'[m]urder is [an] offense which can be committed . . . either with malice aforethought or while in the commission of a felony.'" *Miller v. State*, 571 S.E.2d 788, 794, 275 Ga. 730 (Ga. 2002) *cert. denied* 538 U.S. 1004, 123 S.Ct. 1911, 155 L.Ed.2d 835 (2003) (quoting *State v. Jones*, 553 S.E.2d 612, 274 Ga. 287 (Ga. 2001)). Georgia adheres to the common law felony murder rule, which originated in, approximately, the sixteenth century. *See* Nelson E. Roth and Scott E. Sundby, *The Felony-Murder Rule: A Doctrine At Constitutional Crossroads*, 70 Cornell L. Rev. 446, 449 (1985).[4] Under the rule, a defendant is strictly liable for the consequences of his felonious act, regardless of his intent, provided the State can prove his intent to commit the underlying felony. *See e.g. Holliman v. State*, 356 S.E.2d 886, 257 Ga. 209 (Ga. 1987). Thus, in Georgia the intent to kill is imputed or inferred from the *mens rea* of the underlying felony if the state attempts to prove murder vis-à-vis a theory of felony murder. *See Edge v. State*, 414 S.E.2d 463, 464-465, 261 Ga. 865 (Ga. 1992).

Accordingly, at the conclusion of the trial, the trial court instructed the jury regarding the crime of murder as follows:

> [a] person also commits the crime of murder when, in the commission of a felony, that

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[4] The Washington Supreme Court placed the date of rule's origin at 1536. *See In Re Personal Restraint of Andress*, 56 P.3d 981, 983, 147 Wash.2d 602 (Wash. 2002).

> person causes the death of another human being. Under the laws of Georgia, aggravated assault is a felony and it is defined as follows: a person commits the offense of aggravated assault when he assaults another person with a deadly weapon. An assault is an attempt to commit a violent injury to the person of another.
>
> A person commits the offense of aggravated assault when that person assaults another person with a deadly weapon. To constitute such an assault, actual injury to the alleged victim need not be shown. It is only necessary that the evidence show beyond a reasonable doubt that the defendant attempted to cause a violent injury to the alleged victim. (T. 1035-1036).

At the trial court's charge conference, counsel for Henley objected to the murder charge and the exception was noted and overruled by the court. (T. 926).

Since it is not a crime distinct from malice murder, yet holds that intent to commit murder may be inferred from the intent to commit a wholly unrelated crime, Georgia's felony murder rule creates a conclusive legal presumption of intent to kill, upon proof of intent to commit the underlying felony. Thus, the essential element of intent to commit murder, when the death occurred during the commission of a felony, is *statutorily* presumed. O.C.G.A. §16-5-1(c). Such a presumption violates the rule announced by this Court in *Morrissette v. United States*, 342 U.S. 246, 274, 72 S.Ct. 240, 96 L.Ed.2d 288 (1952),

that, "[h]owever clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury." *See also Sandstrom* at 520-521. Therefore, the instructed presumption violated Henley's rights to a fair trial, a trial by jury and due process of the laws under the Fifth, Sixth and Fourteenth Amendments.[5]

The trial court instructed the jury pursuant to Georgia's felony murder rule and contrary to Henley's constitutional rights as enumerated, *supra*. The court's instruction to the jury that it could convict Henley of a violation of O.C.G.A. §16-5-1 without determining that he possessed the intent to kill therefore worked as a violation of, among others, *Sandstrom, supra*, and was error, requiring his convictions to be vacated.

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[5] Imprisoning Henley based on his conviction which, in turn, was based on this gross violation of his constitutional rights also constituted cruel and unusual punishment, in violation of Henley's rights under the Eighth Amendment to the United States Constitution. *See* U.S. Const. Amend. VIII.

II. Certiorari is warranted because the trial court violated Henley's right to a fair trial and to due process of the law when it refused to consider the contents of an affidavit alleging juror misconduct which thereby denied Henley his right to due process of the law, a fair trial and a fair and impartial jury.

A. The Trial Court Based Its Refusal To Consider The Substance Of An Affidavit In Support Of Henley's Motion For New Trial, Demonstrating Juror Misconduct, On An Erroneous Interpretation Of The Form Requirements For Such Affidavits In Georgia.

In *Crane v. Kentucky*, 476 U.S. 683, 679, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), this Court, "acknowledge[d its] traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts." Nonetheless, in *Crane* as well as other cases, this Court has held that the exclusion of certain evidence, based on a trial court's application of a state evidentiary rule (and even the state Supreme Court's affirmance thereof) can so prejudice a defendant's case as to violate his right to due process and to a fair trial. 476 U.S. at 690. *See also Chambers v. Mississippi*, 410 U.S. 284, 302-303, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

In Georgia, "[t]he affidavits of jurors may be taken to sustain but not to impeach their verdict."

O.C.G.A. §17-9-41. Although this rule, "is deeply rooted in Georgia law," as the Georgia Supreme Court noted in *Henley*, there is an exception to the rule when the affidavit indicates that jurors have independently gathered evidence which they then bring into deliberations, thus affecting not only a defendant's right to confront witnesses (since the juror ostensibly becomes an unsworn witness) against him, but also his right to a fair trial. 678 S.E.2d at 887 (quoting *Satterwhite v. State*, 509 S.E.2d 97, 98-99, 235 Ga. App. 687 (Ga. App. 1998)).

As the language of the statute itself points out, one method of showing juror misconduct is by the sworn affidavit of a juror from the case. *See* O.C.G.A. §17-9-41. Logically, the first moment when a defendant will usually have the opportunity to present such affidavits and argue that a jury's verdict was tainted by extrinsic evidence is *following the verdict* at the motion for new trial. *See e.g. Satterwhite*, 509 S.E.2d at 99. In Georgia, "trial courts on motion for new trial are authorized to consider as substantive evidence the information presented by competent affiants in properly-executed affidavits when the affidavit is made on personal knowledge and sets forth facts that would be admissible in evidence." *Dickens*, 627 S.E.2d at 590 n. 2. Thus, a defendant may submit an affidavit in support of an assertion of juror misconduct and a trial court then may take up the issue of whether, and with what weight, to consider its substance. *Dickens* at 590 n. 2.

Prior to June 8, 2009, no common law, statute or rule of court had proscribed a form or specific content of an affidavit submitted to support a motion for new trial in Georgia, beyond what was noted in *Dickens, supra*. The Georgia Court of Appeals has spoken on the matter infrequently, but has maintained for over eighty years that, "'[a] signed statement of facts, purporting to be the statement of the signer, followed by the certificate of an officer, authorized to administer oaths that it was sworn to and subscribed before him, is a lawful affidavit.'" *Phoenix Air Conditioning Co. v. Al-Carol, Inc.*, 199 S.E.2d 556, 558, 129 Ga. App. 386 (Ga. App. 1973). *See also Miller v. Caraker*, 71 S.E. 9, 9 Ga. App. 255 (Ga. App. 1911). In 1911 *Miller* went so far as to note, heretofore without contradiction, that:

> [u]nder the practice in the British courts, great strictness was formerly required as to the forms of affidavits, and any departure from the prescribed form would vitiate the affidavit. But none of the American courts, so far as our investigation goes, has ever given any great weight to mere form in these matters, and it is well recognized in this state that *no particular form is required*, provided the facts sworn to are committed to writing and signed by the affiant, if, as a matter of fact, the oath was administered. (emphasis added) *Miller*, 71 S.E. at 10.

Thus, beyond the perimeters noted, *supra*, the form of affidavits presented at a motion for new trial has

never been proscribed in common law, court rule or statute in Georgia. *Id.*

If an affidavit fails to conform to the broad perimeters outlined, *supra*, or more specific perimeters set forth by common law, rule or statute for certain types of affidavits, e.g. affidavits supporting motions for summary judgment in civil suits, it is inadmissible and not considered for any purpose in a case in Georgia. *See e.g. Long v. City of Midway*, 311 S.E.2d 508, 510, 169 Ga. App. 72 (Ga. App. 1983) (citing O.C.G.A. §9-11-56(c)). Where an affidavit is proper as to form, the substantive assertions therein become issues of fact for resolution by the trier of fact, but are not subject to striking or non-consideration. *See e.g. Rooks v. Tenet Healthsystem GB, Inc.*, 664 S.E.2d 861, 865, 292 Ga. App. 477 (Ga. App. 2008) (reversing trial court's decision to strike properly executed affidavit which conflicted with subsequent testimony because conflict merely raised issue of fact and could not be grounds for striking portions of the affidavit). Over one hundred years ago, this Court similarly affirmed that an affidavit, proper in form, will survive an objection to its *form*, even where there might be issues as to its content. *See Chicago & N.W.R. Co. v. Ohle*, 117 U.S. 123, 129, 6 S.Ct. 632, 29 L.Ed. 837 (1886) (citing *Pope v. Allis*, 115 U.S. 363, 370-371, 6 S.Ct. 69, 29 L.Ed. 393 (1885)).

When the state argued, at the second motion for new trial hearing, "if [the court was] inclined to admit the affidavit . . . the State should at least have the opportunity to contact the trial jurors, find out if this

is credible and be able to call them as witnesses in a proceeding," it touched on an important distinction: *admissibility* of the document itself, versus *credibility* of the assertions therein. (T. 11). *See e.g. United States v. Indelicato*, 97 F.3d 627, 632 (1st Cir. 1996) (holding that, where trial judge is trier of fact, he is free to reject portions of admissible testimony as not credible). *See also Vandersloot v. Mahoney*, ___ F. Supp.2d ___, 2009 WL 1424212 at *11 (D. Mont. May 19, 2009) (noting that Constitution does not proscribe *admission* of testimony from witnesses who may not be *credible*); *Bradley v. State*, 656 S.E.2d 842, 844, 283 Ga. 45 (Ga. 2008) (noting that jury had heard defendant's testimony regarding killing in self-defense and determined that it was not credible).[6] Because *admissibility* does not equate to *credibility* with regard to witness testimony, the two terms are not interchangeable and courts of law, such as the body which preceded this one, should not be so careless with their interchangeable use of the terms. *See e.g. Vandersloot*, 2009 WL 1424212 at *11.

The trial court cited three alleged defects as to the form of the affidavit in ruling that it was inadmissible at the motion for new trial:

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[6] Would that *admissibility* were equated to *credibility* in Georgia, for instance, accomplice testimony alone would suffice to support a criminal defendant's conviction. *But see* O.C.G.A. §24-4-8 (declaring that uncorroborated testimony of an accomplice is insufficient to support a felony conviction).

- "[t]he juror contacted [defense counsel's] office before the first motion for new trial hearing and executed an affidavit four days before the February 11th hearing;"
- "[t]he affidavit did not contain the contact information for the juror who purportedly executed the affidavit and the juror contact information is not available to either party from the jury management officer without a court order;"
- "[t]he [sic] alleged juror was also not present at the motion for new trial hearings on February 11 and June 24 and the defense did not provide an explanation for his absence." (App. 20-23).

Addressing these matters, *seriatim*, the date of the execution of the document, in that it was prior to the document's submission, has no bearing upon its form and, as such, no bearing upon its admissibility. *See Dickens, supra*. There is no time requirement for submission of an affidavit in support of a motion for new trial in Georgia.[7]

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[7] Moreover, the trial court certainly understood that the juror's initiating contact with counsel was a matter well outside of his control. As the court noted elsewhere in its order, Henley and his attorneys had no access to the jury's contact information.

The lack of contact information, a point of great emphasis by the state at the motion for new trial hearing, is a legal red herring. *Never*, from January 2, 1788, to June 7, 2009, has an appellate court in Georgia noted the disallowance, non-consideration or striking of an affidavit supporting a motion for new trial because it failed to provide contact information for the affiant. Thus, even in the days prior to such conveniences as internet searches, modern (i.e. computerized) court records, telephones (and thus telephone books), the automobile and the veritable arsenal of information-gathering tools available to courts and district attorneys' offices in the twenty-first century, it was not necessary for one to affix his contact information to an affidavit in order to have said affidavit admitted in a court of law. *See Miller*, 71 S.E. at 10.

The state's position regarding the contact information – and perhaps its position regarding the timing of the affidavit's submission – appears to have been guided by Georgia's requirements regarding affidavits used to support *habeas corpus* petitions. *See* (N. 10). *See also* O.C.G.A. §9-14-48(c). That provision states:

> [i]f sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce such an affidavit shall cause it to be served upon the opposing party at least ten days in advance of the date set for a hearing in the case. The affidavit so served shall include the address

> and telephone number of the affiant, home or business, if known, to provide the opposing party a reasonable opportunity to contact the affiant; failure to include this information in any affidavit shall render the affidavit inadmissible. The affidavit shall also be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves. *Id.*

To state the obvious, a motion for new trial *is not* a petition for a writ of *habeas corpus*. As previously stated, there is no statute, rule or common law governing the form of affidavits in support of motions for new trial. *See Dickens, supra*. Thus, unlike the *habeas corpus* statute, there is no requirement that a party wishing to use an affidavit serve it on the other party, "at least ten days in advance of the date set for a hearing in the case," nor is there any requirement that such an affidavit, "include the address and telephone number of the affiant, home or business, if known." O.C.G.A. §9-14-48(c). It was, therefore, wholly inappropriate, and a blatant violation of Henley's right to due process, for the trial court to apply the provisions of O.C.G.A. §9-14-48(c) to the Cruz affidavit supporting Henley's motion for new trial and, based thereon, refuse to admit the document. *See Crane* at 690.

The trial court's final ground for not admitting the affidavit was that the affiant did not appear in

person at the motion for new trial hearings. (App. 21). However, Henley presented Cruz's affidavit in lieu of live testimony, which Henley was fully authrized by the law to do. *See Dickens, supra*. The burden of producing Cruz, then, fell on the state, if it desired to have him testify about matters beyond the content of the affidavit.

The state was fully mindful that it had this burden. As the trial court noted in its order denying Henley's motion for new trial, "the juror contact information is not available to either party from the jury management officer without a court order." (App. 21). With such in mind, at the February 11, 2008, motions hearing, the state requested a continuance:

> really the only issue we're talking about here today is the affidavit. If Your Honor is inclined to admit the affidavit, of course we don't have the original here that is apparently being tendered. But if Your Honor is inclined to admit it, then the State would request[8] a continuance so we would be able to flesh this issue out. (M. 5).

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[8] The Georgia Supreme Court demonstrated uncommon sloth in its recitation of the facts of this case. For instance, it noted in its opinion that, "the *defendant* requested a continuance to 'flesh out' this issue," to which, the Court stated, "[t]he State *acquiesced*." (emphasis added) *Henley* at 887. The situation was just the opposite. *See* (M. 6). These facts are demonstrably wrong.

Without opposition from Henley, the court continued the hearing, "to give the State an opportunity to research it." (M. 6). Henley proposed having the court be responsible for subpoenaing jurors to a subsequent hearing on the issue of misconduct, but the court informed the parties that *they* would be responsible for subpoenaing witnesses to the hearing. (M. 8-9). Thus if the state wanted to have Cruz at the hearing, it knew on February 11, 2008, that it bore the responsibility of doing so. Approximately eleven days before the second motion for new trial hearing and fully *three months* after it declared to the court, "[i]f we're going to have evidence heard on this, I'm going to need to talk some [sic] of these supposed other jurors," the state moved the trial court to release Cruz's contact information to it. (M. 5). The court did not respond to the motion in time, the state was ostensibly left to argue that the affidavit was inadmissible because it had no witnesses (or affidavits of its own) to counter the allegations in Cruz's affidavit.

Consequently, the state was *compelled* to argue to the court that an affidavit, not submitted in a *habeas corpus* case, was nonetheless somehow guided by the *habeas corpus* statute and that, although in Georgia affidavits in lieu of testimony are completely admissible in a motion for new trial, in *this case*, an affidavit was not sufficient and live testimony would be required. For reasons unknown and inexplicable to Henley, the trial court acquiesced to the state's flawed logic and adopted it as the court's own in denying admission of the affidavit, refusing to

consider the allegations therein and, consequently, denying Henley's motion for new trial. *See Dickens, supra*.

By failing to admit the affidavit, even though it comported with any known requirement for such affidavits, and thereby not considering the substantive allegations in the affidavit, the trial court denied Henley his right to due process of the law. *See Crane* at 690. *See also Dickens, supra*.

B. The Georgia Supreme Court Erred In Affirming The Trial Court's Decision On Grounds Not Reached By The Trial Court And Not Appropriate For Appellate Review.

In affirming the trial court's ruling, the Georgia Supreme Court confused the issue even further. The Court incorporated the trial court's reasoning for denying *admission* of the affidavit into its own opinion, but couched the reasoning as a basis for doubting the affidavit's *credibility*, rather than its *admissibility*. *See Henley* at 888. In doing so, the Georgia Supreme Court "necessarily rejected" Henley's argument that he was denied Federally guaranteed right due process of the law (specifically the Sixth Amendment guarantees of a fair and impartial jury as well as a fair trial) under the Fourteenth Amendment. *Turner v. Louisiana*, 379 U.S. 466, 470, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). *See also Henley* at 887.

The court noted five specific grounds for, "question[ing] the averments of the defense's eleventh hour, bare bones affidavit:"

- "the defense made a conscious decision not to have the affiant testify in open court where the State could cross-examine him and his credibility could more readily and more definitively be evaluated by the trial court;"
- "the defendant elected not to include contact information in the affidavit so that the State could speak to the juror and decide for itself whether he was telling the truth;"
- "according to the defendant, the juror approached defense counsel out of the blue, almost a year after the trial but just four days prior to the first hearing on the motion for new trial, to execute the affidavit, a coincidence of timing that even the most credulous judge would have trouble accepting at face value;"
- "[t]he affidavit deliberately omitted information necessary to verify its arresting allegations, including the names of the jurors who supposedly brought in the extrinsic information, the number of jurors who did so, and even their gender" and
- "the time line in the affidavit does not sync with the comings and goings of the

> jurors and the defendant at trial as reflected in the transcript." *Id.*

Henley initially notes the Georgia Supreme Court's surprising confusion of the *admissibility* of a piece of evidence, in this case an affidavit, with the *credibility* of such evidence. *See e.g. Chicago & N.W.R. Co.,* 117 U.S. at 129. Whereas the trial court cited the first three grounds cited by the Supreme Court as its reasons for finding the affidavit *inadmissible*, the Supreme Court incorporated those grounds into a broader argument that the document was *not credible*, an issue which the parties never argued and which the trial court only mentioned in passing after stating that it would not consider the substance of the affidavit *at all*. The Supreme Court, based on its own review of the record and *not based* on any finding by the trial court, therefore concluded that Cruz was incredible as a matter a law in rendering its decision.

Appellate Courts, including this one, have long shown a reticence to substitute their own credibility determinations for those of the original triers of fact, including judges. *See e.g. Rita v. United States*, 551 U.S. 338, 361-362, 127 S.Ct. 2456 (2007). In the rare instances when appellate courts have undertaken the murky task of gauging witness credibility from their traditionally distant position above the trial court, it has been with great caution. The Eleventh Circuit, for instance, has stated that a witness's testimony will only be judged incredible as a matter of law on appeal if it is, "'unbelievable on its face.'" *United States v. Rivera*, 775 F.2d 1559, 1561 (11th Cir. 1985)

(quoting *United States v. Cravero*, 530 F.2d 666, 670 (5th Cir. 1976)). Testimony which is "unbelievable on its face," the Court clarified, is, "testimony as to facts that [the witness] physically could not have possibly observed or events that could not have occurred under the laws of nature." (citations and internal quotes omitted) *Rivera*, 775 F.2d at 1561. Georgia's Supreme Court has itself gone even farther, asserting that it will defer to a factfinder at the trial level and not assess the credibility of witnesses on appeal. *See Ridley v. State*, 223 S.E.2d 131, 132, 236 Ga. 147 (Ga. 1976).

Any assessment of the credibility of Cruz and/or his affidavit by the Supreme Court was the first such assessment by *any* court, since the trial court specifically held that it would not consider the contents of the affidavit and declined to admit it based on its form. (App. 22). *See also Henley* at 888. Such an original assessment of the credibility of a piece of evidence, and particularly that of sworn testimony by a witness, is grossly inappropriate territory for an appellate court. *See Ridley*, 223 S.E.2d at 132. *See also Rita*, 551 U.S. at 361-362. On this basis alone, the Georgia Supreme Court arguably committed an independent violation of Henley's right to due process, but surely exacerbated the trial court's violation of the same. *See Crane, supra.*

Further, Henley has addressed the first two grounds asserted by the Georgia Supreme Court, *supra*, and reaffirms his position that compliance with the only known requirements for affidavits

submitted in support of a motion for new trial cannot possibly be construed as reasons to doubt the credibility of the allegations therein. *See Dickens, supra. See also Chicago & N.W.R. Co.* at 129. With regard to the Supreme Court's third ground, which is similar to the trial court's first ground for denying admission of the affidavit, Henley simply reasserts that the trial court itself conceded that he had no access to Cruz's whereabouts and was beholden to that individual regarding the timing of his contact with his attorneys. In any event, Henley has already argued that the timing of the affidavit should have no tangible effect on its admissibility and, as inappropriate as the Supreme Court's foray into credibility assessment was, the argument is nonetheless equally applicable to the issue of credibility: nothing about the timing of the affidavit makes its contents less believable.

The Georgia Supreme Court's final two arguments echo the trial court's assertions, *in dicta*, regarding possible credibility issues in the affidavit. As argued, *infra*, Henley believes any such issues should have been raised at a hearing on the allegations wherein the state would bear the burden of overcoming the Cruz's allegations and would put on witnesses and evidence in an effort to do so. *See Satterwhite* at 99. Certainly, the Supreme Court's arguments with regard to Cruz's lack of specificity with regard to identifying the juror or jurors who brought the controversial evidence into the deliberations seem more appropriate arguments that a full hearing was necessary, wherein all of the jurors

would be brought in and questioned, as would have been required if the trial court had learned of the extraneous evidence *during* deliberations. *See e.g. United States v. Davis*, 177 F.3d 552, 557 (6th Cir. 1999).

It is no surprise that Cruz could not identify with specificity which of the eleven individuals who, so far as the record indicates, were complete strangers to him before, and really during, the trial, provided the information to the group. If Cruz's memory were sharp enough to recall the names and/or genders of the jurors who provided the information, he may have been reticent to provide that information out of concern for the jurors he was naming, lest he get them in any trouble with the court. All of these are legitimate reasons why Cruz may not have specified the jurors who shared the information with the group, yet none impugns the credibility of the information he shared. As such, the Supreme Court's fourth ground was doubly inappropriate in that it gratuitously trod on the trial court's traditional province, the judging of witness credibility on a motion for new trial and, as if to emphasize *why* the judging of witness credibility is best left to trial courts, this ground was completely unfounded as arguing that the affidavit lacked credibility.

Regardless of the date on which the observations may have taken place, it certainly does not tax the imagination to think that one or more of the jurors lingered long enough in the courthouse's parking lot to have incidentally seen and/or heard the information

they then relayed to the rest of the panel the next day they saw them. Contrary to the trial court's inference that the juror(s) heard and saw the extrinsic evidence in the morning prior to the start of deliberations, *absolutely nothing in Cruz's affidavit or the facts of the case* excludes the conclusion that this information was gained after deliberations ended on Friday, March 2, 2007, when Henley was present at the courthouse[9] along with, obviously, the members of the jury.

The trial court's inference that it was, "highly unlikely," that the jurors could have been in a position to observe the facts later relayed to the jury is wrong. (App. 22). *See also Henley* at 889. For this incorrect recitation of the facts to have served as both courts' basis for denying even the admission of the affidavit for consideration of its substance is a violation of Henley's right to due process and demands that his convictions be vacated. *See Crane, supra.*

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[9] In point of fact, Cruz's affidavit states that the juror(s) who saw Henley's car saw him in it, "*near* the courthouse," so it certainly was not necessary that this viewing occurred moments before or after the conclusion of proceedings in the courtroom. (App. 49).

III. Certiorari is warranted because, based on the Georgia's courts' violations of Henley's due process rights, neither ordered a hearing to consider his substantive argument that extrinsic evidence had been infused into the jury's deliberations in his case, thereby violating his rights to due process, a fair trial and to a fair and impartial jury.

In *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), this Court held, "[i]n essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." (citations omitted). In *Turner*, the Court noted that, "[t]he requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." (citations and internal quotes omitted) 379 U.S. at 472. Thus, concluded Justice Stewart, "[i]n the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (citations and internal quotes omitted) *Turner* at 472-473. The Ninth Circuit has gone so far to note, recently, that, "[b]ecause an impartial jury is so fundamental to the Sixth Amendment right to a fair

trial that, '[d]oubts regarding bias must be resolved against the jury.'" *United States v. Mitchell*, 568 F.3d 1147, 1154 (9th Cir. June 23, 2009).

In Georgia, if, "there is a reasonable possibility that the improper evidence collected by jurors contributed to the conviction," a trial court should hold a hearing to determine whether or not a new trial is necessary. *Satterwhite* at 99 (quoting *Bobo v. State*, 327 S.E.2d 208, 254 Ga. 146 (Ga. 1985)). If the evidence admitted at that hearing shows that, "jurors affirmatively sought to sway their fellow jurors' votes by relating personal observations and opinions concerning facts and circumstances surrounding the crime which were critical to" central issues in the case, prejudice arises and a new trial is appropriate. *See Bobo*, 327 S.E.2d at 208. O.C.G.A. §17-9-41, cited, *supra*, "is inapplicable," in such circumstances. *Satterwhite*, 509 S.E.2d at 99.

It is concededly true that, if Cruz's affidavit did not support a credible argument that some fundamental at right of Henley's was violated, the shockingly errant rulings of the trial court and the Georgia Supreme Court would not be matters appropriate for review for this Court. *See Crane* at 679. However, as *Turner* makes plain, the right to a fair and impartial jury, and the fair trial that flows (in part) therefrom are both fundamental rights guaranteed to Henley vis-à-vis the Fourteenth Amendment. 379 U.S. at 472. Certainly, even if this Court did not acknowledge the right, Georgia has unequivocally stated that, where a juror brings extraneous evidence into

deliberations he, "essentially [becomes an] unsworn witness against the defendant in violation of the Sixth Amendment." *Satterwhite* at 688. The remedy that both this Court and the Georgia Supreme Court have proscribed where allegations of juror misconduct are afoot is a hearing wherein the credibility of the allegation, and the effect of the information upon the jury, should be assessed. *See Smith v. Phillips*, 455 U.S. 209, 215, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). *See also Satterwhite, supra*; *Bobo* at 208; *Turner, supra*. The failure of Georgia's courts to conform to their own rules, as well as the procedures demanded by Henley's rights under the Sixth and Fourteenth Amendments, requires that his convictions be vacated. *See Satterwhite, supra. See also Crane, supra; Turner, supra*.

CONCLUSION

WHEREFORE, for the reasons enumerated, *supra*, and any other ground deemed appropriate by this Court, Henley moves this Honorable Court to grant his petition for certiorari and recall the mandate of the Georgia Supreme Court so that it might consider the issues enumerated, *supra*.

This 28th day of September, 2009.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: JUN-8 2009

S09A0299. HENLEY v. THE STATE.

SEARS, Chief Justice.

In 2007, a jury convicted Andre Shane Henley of malice murder, felony murder, and aggravated assault for shooting Menes Kori Tripp to death. Henley appeals, arguing that the trial court committed reversible error in refusing to consider, at the motion for new trial stage, an affidavit attributed to one of the jurors that alleged irregularities in the jury's deliberations. We have determined that the trial court did not err in declining to consider the affidavit, and Henley's remaining enumerations of error are without merit. Accordingly, we affirm.[1]

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[1] The defendant committed his crimes on April 7, 2006. A DeKalb County grand jury indicted him for malice murder, felony murder, and the predicate felony of aggravated assault on July 13, 2006. Following a seven-day trial, the jury convicted him on all counts on March 6, 2007. The felony murder conviction was vacated by operation of law, and the aggravated assault conviction merged into the malice murder conviction. OCGA § 16-1-7(a)(1); *Rivers v. State,* 283 Ga. 108, 109 n.1 (657 SE2d 210) (2008); *Sturgis v. State,* 282 Ga. 88, 88 n.1 (646 SE2d 233) (2007). The trial court sentenced the defendant to life in prison. The defendant filed a motion for new trial on March 28, 2007, and an amended motion for new trial on February 8, 2008. Following evidentiary hearings on February 11, 2008, and June 24, 2008, the trial court denied the motion on October 30, 2008. The defendant appealed. The case was docketed on November 5, 2008, and submitted for decision on the briefs.

1. The evidence presented at trial showed that on April 7, 2006, the victim borrowed his brother's cell phone and used it to make several calls to the defendant. The purpose of the calls was to arrange a meeting to inspect marijuana the defendant was offering for sale. The victim's brother drove him to a Blockbuster parking lot for the meeting. Before leaving the parking lot, the victim's brother saw the victim get into a Honda Accord with the defendant, whom the victim's brother knew only by the nickname "Blood." The victim's brother drove to a friend's house, and about 45 minutes later, the victim, who had taken his brother's cell phone with him, called his brother from an unknown number. The victim sounded out of breath and asked his brother to pick him up at a nearby church.

The victim's brother and the friend he was visiting armed themselves with a .357 revolver and a .25 caliber pistol before proceeding to the church. When they arrived, the victim was standing in front of the church with an older gentleman whose cell phone the victim had used to call his brother. Shots rang out, and the victim's brother and his friend saw the defendant pulling up behind them in the Honda Accord. Bullets struck the car, and the victim's brother drove it into the curb. The defendant drove around, and the victim's brother saw the defendant shoot the victim in the back as he was running away, killing him.

The victim's brother never recovered his cell phone. However, he was able to check his voicemail

messages, including one left by the defendant a few minutes before the shootout. The defendant accused the victim and his brother of setting him up and threatened "to kill one of y'all." The police taped the voicemail message, and it was admitted at trial over the defendant's objection.

Though the defendant does not directly challenge the sufficiency of the evidence to support his conviction, we raise the issue on our own. Viewed in the light most favorable to the verdict, the evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt.[2]

2. The defendant raises several issues on appeal, only one of which calls for extended discussion. The defendant was convicted on March 6, 2007, after a seven-day jury trial. He filed a motion for new trial three weeks later, and the trial court scheduled a hearing for Monday, February 11, 2008. At 3:40 p.m. the Friday before the hearing, the defendant filed an amended motion for new trial. The amended motion claimed that the jury's verdict was based on evidence not presented at trial and attached a two-page affidavit from Dr. Francisco Cruz, a juror who served on the panel that convicted the defendant.

The affidavit claimed that the jury was initially split 6-6, but after the first full day of deliberations,

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[2] *Jackson v. Virginia*, 443 U.S. 307, 309 (99 SC 2781, 61 LE2d 560) (1979); *In re Winship*, 397 U.S. 358, 361-364 (90 SC 1068, 25 LE2d 368) (1970).

the vote had changed to 8-4 to acquit. Following a weekend recess, one or more unnamed jurors, whose gender and number were not specified, relayed to the rest of the jurors that they had seen the defendant driving a Honda Accord near the courthouse that morning and responding to the name "Blood" in the hallway. The affidavit alleged that the eight jurors who had previously voted to acquit changed their votes to "guilty" as a result.

At the motion for new trial hearing, the defendant requested a continuance to "flesh out" this issue. Cruz was not present to testify to the contents of the affidavit, and defense counsel offered no explanation for his absence. The State acquiesced in the request for a continuance, and the trial court said it would schedule a second hearing on the motion at a date and time certain. Defense counsel recommended that the trial court "take responsibility for getting the other sitting and deliberating jurors into [the] hearing without the State sending out folks to talk to them, us sending out folks to talk to them." The trial court rejected that suggestion, noting that counsel for both sides were officers of the court and could be expected to conduct themselves accordingly. The trial court said that when the time came, it would allow the attorneys to subpoena other jurors to testify, but did not in any way restrict the defendant's ability to secure Cruz's presence at the continued hearing.

The second hearing took place over four months later. Again, the defense did not present Cruz to provide live testimony. Asked whether she intended to

call Cruz to the stand, defense counsel replied simply, "I had planned on it, but no." Defense counsel volunteered no explanation for Cruz's absence from the hearing scheduled for the express purpose of fleshing out the claims contained in the affidavit attributed to Cruz. The trial court heard argument from both sides and ruled it would not admit the affidavit to impeach the jury's verdict.

Defense counsel requested another continuance "in order to bring Dr. Cruz" in to testify. The trial court explained, several times, that the hearing on the new trial motion was currently underway, both parties had ample notice of it, and the hearing was the defense's opportunity to have Cruz appear to elaborate on and bolster the threadbare allegations of the affidavit. The trial court denied the request for yet another continuance and instructed defense counsel to call any witnesses it wished to present in support of the motion for new trial. Defense counsel responded, "I have nothing, Judge." The trial court subsequently entered orders denying the motion for new trial and declining to consider the juror affidavit offered in support of it.

Generally speaking, a jury verdict may not be challenged based on an affidavit from one or more jurors.[3] The purpose of the rule, which has deep roots in Georgia law, is to promote the finality of jury

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[3] *See* OCGA § 17-9-41 ("The affidavits of jurors may be taken to sustain but not to impeach their verdict.").

verdicts, protect jurors from post-trial harassment, and, most importantly, "to keep inviolate the sanctity of juror deliberations."[4] However, as with most legal rules, it is subject to exceptions. Where jurors independently gather evidence related to the case and share it with other jurors, they make themselves, "in a real sense, unsworn witnesses against the [defendant] in violation of the Sixth Amendment."[5] Juror misconduct of this sort may also deprive the defendant of a fair trial,[6] and a new trial will be granted if "there is a reasonable possibility that the improper evidence collected by jurors contributed to the conviction."[7]

The trial court recognized its authority to consider the juror affidavit under the exception to the rule of OCGA § 17-9-41 but declined to do so. At bottom, the trial court did not find the spare two-page affidavit credible. The trial court recited the following reasons: (1) the affidavit provided no contact information to allow the State to contact the juror to confirm or disprove the allegations; (2) despite the explosive nature of the affidavit's claims, the defendant failed to secure Cruz's presence at either of two hearings on the motion for new trial and offered no explanation for failing to do so; (3) it appeared from the affidavit

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[4] *Watkins v. State*, 237 Ga. 678, 684 (229 SE2d 465) (1976).

[5] *Watkins*, 237 Ga. at 684. Accord *Satterwhite v. State*, 235 Ga. App. 687, 688 (509 SE2d 97) (1998).

[6] *Turpin v. Todd*, 268 Ga. 820, 823 (493 SE2d 900) (1997).

[7] *Brooks v. State*, 265 Ga. 548, 550 (458 SE2d 349) (1995).

that the juror either never knew or no longer remembered the names, gender, or number of the other jurors who supposedly injected verdict-altering extrinsic information into the jury's deliberations; and (4) the time line reflected in the affidavit did not match up with how the trial actually progressed.

The defendant insists the trial court's ruling was erroneous. We agree with the defendant that the affidavit's claims are startling and, if accurate, would call into question the basic fairness of the defendant's trial and the fundamental reliability of the defendant's conviction. However, as the trial court pointed out, there are sound reasons to question the averments of the defense's eleventh hour, bare bones affidavit. First, the defense made a conscious decision not to have the affiant testify in open court where the State could cross-examine him and his credibility could more readily and more definitively be evaluated by the trial court. Second, the defendant elected not to include contact information in the affidavit so that the State could speak to the juror and decide for itself whether he was telling the truth. Third, according to the defendant, the juror approached defense counsel out of the blue, almost a year after the trial but just four days prior to the first hearing on the motion for new trial, to execute the affidavit, a coincidence of timing that even the most credulous judge would have trouble accepting at face value. Fourth, the affidavit deliberately omitted information necessary to verify its arresting allegations, including the names of the jurors who supposedly brought in the

extrinsic information, the number of jurors who did so, and even their gender. Fifth, the trial court found, and our own review of the record confirms, that the time line in the affidavit does not sync with the comings and goings of the jurors and the defendant at trial as reflected in the transcript.

In addition, a careful review of the transcript belies the claim by defense counsel and the affidavit that whether or not the defendant's nickname was "Blood" was a "central issue" in the case. Early in the trial, the defense itself recognized that evidence the defendant was known by the sobriquet "Blood" would not have any significant probative value. The defense filed a motion in limine to prevent the prosecution and all its witnesses from referring to the defendant as "Blood" precisely because, in defense counsel's own words:

> I anticipate the State will have witnesses who will identify Mr. Henley, and they can come in and they can identify him. So there is no necessity to identify him using the moniker, or alias of Blood.

Counsel's prediction about what would transpire at trial turned out to be correct.

The defendant's connection, or lack thereof, to a Honda Accord also did not feature prominently as a disputed issue in the arguments of counsel and the presentation of evidence to the jury. In any event, given the overwhelming evidence of the defendant's guilt, including substantial eyewitness testimony and

a recorded threat by the defendant to kill the victim or his brother shortly before the shooting, we find it difficult to conceive that the strength of the evidence linking the defendant to the Honda Accord was the driving force behind any juror's vote.

In view of the trial court's findings, and in light of our own exhaustive review of the record, we cannot say the trial court abused its discretion in declining to consider the juror affidavit in ruling on the defendant's motion for new trial.

3. The defendant claims the trial court erred by denying his challenge under *Batson v. Kentucky* to the State's use of its peremptory strikes to exclude two African-Americans – Juror 9[8] and Juror 23[9] –

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[8] The State said it struck Juror 9 because she appeared to be nodding off or even sleeping during parts of voir dire, was not well educated, restricted her reading material to a single book, the Bible, and seemed to lack a broad sense of what was going on in society. The prosecutor stated that based upon Juror 9's responses, manner of response, lethargy, and lack or apparent lack of interest in what was going on in society, she feared Juror 9 "would essentially be a non-participating juror and would just go along with whatever was happening." She added, "I don't see here based upon her responses and her behavior her actually contributing to any discussion, at least significantly[, or] adding any of her thoughts to the process."

[9] The State said it struck Juror 23 because he closed his eyes and started talking to himself silently but conspicuously for a significant period of time while the juror next to him was standing up being questioned in voir dire. Given Juror 23's vocation as a pastor, the prosecutor assumed he was praying. She explained that the State did not object to prayer, certainly, but that this juror's conduct seemed out of place in the

(Continued on following page)

from the panel that convicted him.[10] However, as the trial court found, the State provided race neutral reasons for the strikes,[11] and the defendant failed to prove that purposeful racial discrimination was behind the strikes.[12] Accordingly, there was no error.

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particular context of voir dire of a potential juror who was standing right next to him and being actively questioned. The prosecutor said, "we don't know how that may affect him when he is back in the jury room," and she expressed concern "about how he may actually interact and react with other jurors." Defense counsel noted that the defendant's objection to the strike was not based on a claim of religious discrimination in the use of peremptory strikes: "I'm not arguing that they struck him because he is religious. It appears that they struck him because he is black. That's what I'm arguing."

[10] *Batson v. Kentucky,* 476 U.S. 79 (106 SC 1712, 90 LE2d 69) (1986).

[11] *See Purkett v. Elem,* 514 U.S. 765, 767-768 (115 SC 1769, 131 LE2d 834) (1995) ("The second step of this process does not demand an explanation that is persuasive, or even plausible. 'At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'") (alteration in original) (citation omitted).

[12] *Williams v. State,* 271 Ga. 323, 324, 519 SE2d 232 (1999). *See Purkett,* 514 U.S. at 767 ("Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.").

4. The defendant maintains that the trial court erred in failing to strike, in its entirety, the testimony of the victim's brother's friend. The witness testified at trial that when he spoke to the police after the incident, he did not tell them the truth about what had happened. He went on to say, to the surprise of both the prosecution and the defense, that he later told officers who accompanied him to a bond hearing the same account incriminating the defendant that he had just recounted in open court. Prior to that moment, neither the prosecution nor the defense was aware that another statement had been made by this witness. Outside the presence of the jury, the defense moved to strike the witness's testimony in its entirety as a remedy for the State's failure to disclose the statement to the defense prior to trial in violation of OCGA § 17-16-7[13] and *Brady v. Maryland*.[14] The trial

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[13] OCGA § 17-16-7 provides:

> No later than ten days prior to trial or at such time as the court permits, or at the time of any post-indictment pretrial evidentiary hearing other than a bond hearing, the prosecution or the defendant shall produce for the opposing party any statement of any witness that is in the possession, custody, or control of the state or prosecution or in the possession, custody, or control of the defendant or the defendant's counsel that relates to the subject matter concerning the testimony of the witness that the party in possession, custody, or control of the statement intends to call as a witness at trial or at such post-indictment pretrial evidentiary hearing.

[14] *Brady v. Maryland*, 373 U.S. 83 (83 SC 1194, 10 LEd2d 215) (1963).

court reserved its ruling to see what other information might come out on cross-examination, but the defense subsequently decided not to cross-examine the witness. The trial court did not strike the testimony and later declined to grant the defendant a new trial on this basis.

The defendant's claim under OCGA § 17-16-7 is meritless. It is well established that the statute does not apply to oral witness statements not recorded or memorialized in any way because they are not, in the words of the statute, "in the possession, custody, or control of the state or prosecution."[15]

As for *Brady,* it requires the prosecutor to disclose all evidence favorable to the defendant that is material to the defendant's guilt or punishment.[16] The rule applies to exculpatory materials known to the prosecutor or only to police investigators,[17] and it includes evidence that would tend to impeach a government witness.[18] The witness testified at trial that he had given a statement to law enforcement on the way to a bond hearing consistent with his trial testimony but inconsistent with what he told the

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[15] OCGA § 17-16-7. *See Burgess v. State,* 276 Ga. 185, 186 (576 SE2d 863) (2003); *Phagan v. State,* 268 Ga. 272, 283 (486 SE2d 876) (1997).

[16] *Brady,* 373 U.S. at 87.

[17] *Strickler v. Greene,* 527 U.S. 263, 280-281 (119 SC 1936, 144 LE2d 286) (1999).

[18] *Giglio v. United States,* 405 U.S. 150, 154-155 (92 SC 763, 31 LE2d 104 (1972).

police the day of the murder. This information might have been useful to the defense in attacking the witness's credibility on cross-examination. However, *Brady* is violated only where undisclosed evidence is "material," i.e., "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[19] We have no trouble concluding that the undisclosed statement does not rise to this level.

The witness admitted on the stand that he initially lied to the police about what happened. It is hard to see how even the most skilled criminal defense attorney could use the fact that the witness changed his story on the way to a bond hearing instead of on the witness stand at the defendant's trial to make a significantly stronger attack on the witness's credibility during cross-examination than was already available. The defense, armed with knowledge of the prior statement due to its disclosure on direct examination, in fact chose not to cross-examine the witness at trial. The witness's oral statement on the way to the bond hearing was thus not "material," and the State's failure to disclose it before trial did not constitute a *Brady* violation. Accordingly, the trial court did not err in declining to strike the witness's testimony as a remedy.

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[19] *Kyles v. Whitley*, 514 U.S. 419, 433 (115 SC 1555, 131 LE2d 490) (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (105 SC 3375, 87 LE2d 481) (1985) (plurality opinion)) (internal quotation marks omitted).

5. The defendant asserts that the trial court erred in overruling a hearsay objection to testimony by Sergeant James Smith regarding investigative work he performed on the case. Sergeant Smith participated in the investigation through desk work. Using information gained by the police, he obtained telephone records and subscriber information to identify potential suspects. This testimony was not hearsay as defined in OCGA § 24-3-1, as Sergeant Smith simply described on the stand the steps he personally took that led to the identification of the defendant as a suspect. Sergeant Smith did not relay information told to him by other persons, and his testimony was nothing more than a recitation of his own actions. Accordingly, the trial court properly overruled the hearsay objection.

6. The defendant argues that the trial court erred in admitting the tape of the voicemail message the defendant left on the victim's brother's voicemail service shortly before the shooting because the voicemail itself, as opposed to the tape of the voicemail, was not properly authenticated under *Steve M. Solomon, Jr., Inc. v. Edgar.*[20] *Solomon* established a seven-part test for authentication of a recording: (1) the mechanical transcription device must be capable of taking testimony; (2) the operator of the device must be competent to operate it; (3) the authenticity

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[20] *Steve M. Solomon, Jr., Inc. v. Edgar*, 92 Ga. App. 207, 211-212 (88 SE2d 167) (1955).

and correctness of the recording must be established; (4) it must be shown that no changes, additions, or deletions have been made; (5) the manner of preservation of the recording must be shown; (6) the speakers must be identified; and (7) it must be shown that the statements recorded were freely and voluntarily made without duress.

OCGA § 24-4-48 creates an additional method for authenticating a recording. The statute applies where a witness necessary to authenticate the recording is "unavailable" due to a "privilege from testifying concerning the subject matter of the authentication."[21] Here, the defendant could authenticate the recording, but he was "unavailable" to the State because of his constitutional right not to be "compelled in any criminal case to be a witness against himself."[22] OCGA § 24-4-48(b) provides that "recordings shall be admissible in evidence . . . when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered."

The admission or exclusion of evidence under OCGA § 24-4-48 is a matter within the trial court's discretion.[23] The victim's brother testified that he pressed "*" to access his voicemail service, punched in his code, and listened to his voicemail messages as he

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[21] OCGA § 24-4-48(a)(1).

[22] U.S. Const. Amend. V.

[23] *Sweet v. State*, 276 Ga. 545, 546 (580 SE2d 231) (2003).

had done "too many times to count." He testified that he had known the defendant for approximately two years and recognized his voice on the message left just before the shooting. He further stated that he knew from long experience with this voicemail service that it accurately records messages. The State also entered into evidence phone records showing that a call placed from the defendant's cell phone number to the victim's brother's cell phone number went to voicemail at the relevant time. This is competent evidence sufficient to establish the reliability of the voicemail message for purposes of authentication. The trial court did not abuse its discretion in admitting the tape of the voicemail message.

7. The defendant contends the felony murder charge given to the jury violated his rights under multiple amendments to the United States Constitution. However, the charge given was the suggested pattern jury charge,[24] which is itself based on the felony murder statute. We have repeatedly denied challenges to the constitutionality of the charge.[25] This enumeration of error is meritless.

Judgment affirmed. All the Justices concur.

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[24] *Suggested Pattern Jury Instructions, Vol. II: Criminal Cases,* Council of Superior Court Judges, 4th ed., § 2.10.20 (2008).

[25] *Thomason v. State,* 281 Ga. 429, 431 (637 SE2d 639) (2006); *Speed v. State,* 270 Ga. 688, 698 (512 SE2d 896) (1999).

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA	)	
	)	
v.	)	Case No. 06CR3288-5
	)	
ANDRE HENLEY,	)	
	)	
Defendant.	)	

ORDER DENYING MOTION FOR NEW TRIAL

(Filed Oct. 30, 2008)

This case came before the Court on February 11, 2008, and June 24, 2008, for hearings on the Defendant's motion for new trial and amended motion for new trial. The Defendant was in court and was represented by Bruce Harvey and Jennifer Hanson, Attorneys at Law.[1] The State was represented by Assistant District Attorney Daniel J. Quinn. After hearing argument, the Court finds that the Defendant has failed to show trial error that would warrant granting the motion for new trial and amended motion for new trial. The Court finds that the Defendant's pretrial motion to suppress an identification of Defendant from a photograph was properly denied. See *State v. Hattney*, 279 Ga. 88 (2005). The witness at issue, Justin Neason, knew the Defendant. See id. The Court further finds no error with the admission of the photograph with markings by Neason

[1] Harvey was not present on June 24, 2008.

identifying the man in the photograph as the man he saw shoot the victim.

The Court finds no error with the language of the indictment charging Defendant with malice murder. See *Hinton v. State*, 280 Ga. 811, 815(3) (2006).

The Court finds no error in permitting the State to introduce evidence that the murder occurred in connection with a drug deal between Defendant, the victim, and Justin Neason, as this provided motive. See *Adams v. State*, 272 Ga. 115, 117(4) (2000). The Court did grant Defendant's motion in limine as to prior drug deals between Defendant, the victim, and Neason. Neason was only permitted to testify that he had known Defendant for two years, met with him before, and had spoken with him on the phone.

The Court finds no error in permitting relevant evidence that Defendant's nickname was "Blood." This nickname was the only name by which two witnesses knew Defendant and the Court further noted that it is not prejudicial because it is slang for "brother." See *Burtts v. State*, 269 Ga. 402, 402-403(2) (1998).

The Court finds that Juror number 13 was not disqualified to serve as a juror even though he had a police officer brother and was inclined to believe police officers; Juror number 13 also specifically said that he would not automatically believe the testimony of a police officer over another witness and that he would consider an officer's testimony in conjunction

with other evidence. See *Watts v. State*, 200 Ga. App. 54, 55(2) (1991).

The Court finds no error with the admission of a voice mail recording, State's Exhibit 12, as its reliability was sufficiently established. See OCGA § 24-4-48; *Dawson v. State*, 283 Ga. 315, 317-319(2) (2008); *Griffin v. State*, 282 Ga. 215, 223(10) (2007); *Scott v. State*, 279 Ga. 596, 598(3) (2005); *Phagan v. State*, 268 Ga. 272, 279-282(5) (1997); *Ellis v. State*, 279 Ga. App. 902, 902-904(1) (2006); *Craft v. State*, 252 Ga. App. 834, 843-844(2) (2001) (defendant is unavailable as "authenticating witness" under OCGA § 24-4-48 because of privilege); *Shaw v. State*, 247 Ga. App. 867, 872-873(4) (2001). Neason specifically testified that he had known Defendant for two years, that he recognized Defendant's voice on the voice mail, has recognized Defendant's voice on the phone before, that his voice mail service accurately recorded the message, that he pressed * to access his voice mail, punched his code into his phone to access the voice mails, and listened to his voice mails, as he has done "too many times to count." (T II 436-437; T III 501-502, 560, 603) The State also presented evidence that a phone call was made from Defendant's cell phone to Neason's cell phone that went to voice mail at the relevant time. (State's Exhibit 15, T VI 1090; State's Exhibit 17, T VI 1145)

The Court finds no error in the admission of a photograph of the victim in life. See *James v. State*, 270 Ga. 675, 677(5) (1999) (the general rule is that it is not error to admit a picture of the victim in life).

The Court finds no error with Detective Smith's testimony that he ran a date of birth on a phone subscriber account ascribed to "Blood" and came up with Defendant's name on a database of crime victims. (T IV 864) There is no prejudice in being a victim of crime so the Court did not err by denying the motion for mistrial.

The Court finds no error from the State allegedly failing to turn over an oral statement by witness Jamaal Parker to the defense. This statement cannot be construed as exculpatory or as a prior inconsistent statement and the law is well-settled that the State does not need to produce oral statements by a witness under OCGA § 17-16-7 because the State does not have possession, custody, or control of an oral statement. See *Buttrum v. State*, 280 Ga. 595, 598(5) (2006) (no merit to defendant's claim that State violated OCGA § 17-16-7 because the oral statement in question was not recorded or otherwise committed to writing); *Burgess v. State*, 276 Ga. 185, 186(2) (2003).

There was no error with the jury charge nor was there any error with the indictment for aggravated assault. The Court did not err by allowing two different lawyers for the State to argue the opening and concluding arguments.

The Court finds that the purported affidavit of a trial juror was not admissible at the motion for new trial hearing. Defense counsel claimed that the juror contacted his office before the first motion for new

trial hearing and executed an affidavit four days before the February 11th hearing. The affidavit did not contain the contract information for the juror who purportedly executed the affidavit and the juror contact information is not available to either party from the jury management office without a court order. See OCGA § 9-14-48(c) (affidavits in habeas corpus proceedings must contain "the address and telephone number of the affiant, home or business, if known, to provide the opposing party a reasonable opportunity to contact the affiant"); *Dickens v. State*, 280 Ga. 320, 322 n.2 (2006) (concluding that a trial court on a motion for new trial is authorized to consider the evidence in a properly executed affidavit and referencing OCGA § 9-14-48). The alleged juror was also not present at the motion for new trial hearings on February 11 and June 24 and the defense did not provide an explanation for his absence.

After a review of the affidavit, the Court also has concerns about its credibility. In paragraphs 10 and 11 of the affidavit, the affiant states that during deliberations on Monday, March 5, 2008 [2007], he heard "one or more of the jurors" tell the jury that "they" or "(s)he" had seen Defendant doing incriminating activity in the hallway outside the courtroom or while Defendant was driving near the courthouse. The affiant was not the one who allegedly observed these things and he apparently does not know or remember how many people allegedly saw this, if they were the same people who saw each incident, or even the gender of the alleged observer(s).

A review of the trial transcript raises additional concerns. The first day of deliberations was Friday, March 2, 2007. After the jury had deliberated for about two hours, the Court released them for the weekend. The Court instructed the jury to return to the courtroom and begin deliberating no later than 8:30 a.m. on Monday, March 5, the day the alleged observations were allegedly reported to the jury, according to the affidavit. (T V 1046-1048) As is the Court's usual practice, the jury was then escorted from the courtroom by a bailiff. (T V 1048-1049) The parties and the lawyers were required to remain in the courtroom until the deputy who had escorted the jury away from the courtroom had returned. (T V 1049; see also T VI 1053) The Court instructed the parties and lawyers that they should return to the courtroom at 10:00 a.m. on Monday, March 5, one and a half hours after the jury was required to return. (T V 1049) These circumstances make it highly unlikely that "one or more of the jurors" would have been in a position to observe the Defendant doing the things alleged in the affidavit during their deliberations.

For the foregoing reasons, the Court recognizes that it is authorized to consider the purported affidavit, but, in the exercise of its discretion, finds that the purported affidavit of the trial juror is not admissible. See *Dickens*, 280 Ga. at 322 n.2; *Castell v. State*, 250 Ga. 776, 792(11) (1983) (A trial court can refuse the admission of an affidavit because "[i]t has been held that on motion for new trial, the court has the discretion to hear affidavits or oral testimony.");

Watkins v. State, 237 Ga. 678, 683-684 (1976) (With limited exceptions, "the affidavits of jurors may be taken to sustain but not to impeach their verdict.").

The Court finds that the evidence was sufficient to support Defendant's convictions for malice murder, felony murder, and aggravated assault. *Jackson v. Virginia*, 443 U.S. 307 (1979).

The Court finds no merit with any other alleged error advanced by Defendant.

For these reasons, the motion for new trial, as amended, is DENIED on all grounds.

SO ORDERED, this the 30th day of Oct., 2008.

/s/ Gregory A. Adams
GREGORY A. ADAMS, JUDGE
DEKALB COUNTY
SUPERIOR COURT
STONE MOUNTAIN
JUDICIAL CIRCUIT

Order prepared by Daniel J. Quinn, Assistant District Attorney

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IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA	)	
	)	
v.	)	Case No. 06CR3288-5
ANDRE HENLEY,	)	
Defendant.	)	

ORDER DENYING ADMISSION OF AFFIDAVIT

(Filed Oct. 30, 2008)

This case came before the Court for a hearing on the Defendant's motion for new trial. At that hearing the Defendant sought to admit a copy of the affidavit of a juror, Dr. Francisco Cruz, who had served during Defendant's trial. Defendant had attached the original affidavit of Dr. Cruz to the Defendant's amended motion for new trial, which was filed in the superior court clerk's office on Friday, February 8, 2008, at 3:41 p.m. The original affidavit was not presented to the Court at the hearing. Defendant's lawyer claimed that Dr. Cruz had called his office unsolicited after the verdict and before the motion for new trial hearing to complain about alleged juror misconduct during deliberations. Dr. Cruz was not present to testify at the February 11th hearing. The Court reserved ruling on the admissibility of the affidavit and continued the motion for new trial hearing until a later date.

On May 28, 2008, the motion for new trial hearing was re-set for June 24, 2008. The State filed

a motion for access to the contact information of the trial jurors on June 13, 2008. The parties do not have the telephone numbers and addresses of the trial jurors during and after a trial; the jury management office retains that contact information and it only becomes available through a court order.

At the motion for new trial hearing on June 24, 2008, Defendant again sought to admit the affidavit of Dr. Cruz. Dr. Cruz was again not present at the hearing. Defendant requested that the Court admit the affidavit and rule on the juror misconduct issue based solely on Dr. Cruz's affidavit; the Defendant opposed a continuance for the granting of the State's motion for the contact information of the trial jurors.

The Court recognizes that it is authorized to consider the affidavit, but, in the exercise of its discretion, finds that the affidavit of the trial juror is not admissible. See *Dickens*, 280 Ga. at 322 n.2; *Castell v. State*, 250 Ga. 776, 792(11) (1983) (A trial court can refuse the admission of an affidavit because "[i]t has been held that on motion for new trial, the court has the discretion to hear affidavits or oral testimony."); *Watkins v. State*, 237 Ga. 678, 683-684 (1976) (With limited exceptions, "the affidavits of jurors may be taken to sustain but not to impeach their verdict.").

It is SO ORDERED, this 30th day of Oct., 2008.

/s/ Gregory A. Adams
GREGORY A. ADAMS, JUDGE
Dekalb County Superior Court
Stone Mountain Judicial Circuit

IN THE SUPERIOR COURT
OF DEKALB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	**CASE NO:**
Plaintiff	**06-CR-3288-5**
vs.	**MOTION FOR NEW TRIAL**
ANDRE SHANE HENLEY	
Defendant	(Filed Jul. 9, 2008)

* * *

The above-entitled matter came on for hearing in the Superior Court of DeKalb County, Decatur, Georgia, Monday, the 11th day of February, 2008; beginning and before the **HONORABLE GREGORY A. ADAMS**.

The following is a complete transcript of the proceeding reported by Kelly Carpenter, Official Court Reporter.

* * *

[6] admissible on motions for new trial. Second place, the affidavit clearly states that the jury considered extraneous evidence. Once there is a showing that the jury considered evidence, and secondarily that that extraneous evidence had a prejudicial effect on the defendant, there is a presumption of prejudice to the defendant and the prosecution carries the burden of establishing beyond a reasonable doubt that no harm occurred.

I understand that this is coming late to the State. It's my position, Judge, that a hearing is required to be had by the Court once a bona fide showing of irregular juror conduct is shown. If the State wants to have a hearing and wants time to prepare for that hearing, I am not really in a position to oppose it since we filed the affidavit on Friday afternoon.

I've talked to Mr. Henley about that and he understands that situation, but I do think that we have made a prima facie legal showing of irregular juror conduct and now there's a presumption of harm that accrues to the defendant.

THE COURT: As far as for the purposes of this, since it was only filed recently, I'm going to take this matter off of my calendar. I'm going to give the State an opportunity to research it. We will set it down for a date and time certain. How much time will the State need to [7] prepare?

MR. QUINN: My February is pretty swamped, Your Honor, at least thirty days, possibly forty-five days if that's possible. If we're going to have evidence heard on this, I'm going to need to talk some of these supposed other jurors.

MR. HARVEY: Wait. Wait. I'd like to address that. Okay?

THE COURT: I'm listening.

MR. HARVEY: And I didn't mean to interrupt you. That's why I said hold on a second and I apologize for interrupting.

This juror contacted me, contacted us. I didn't reach out to contact the juror. I think a hearing is required on this matter to flesh out the allegations contained in this affidavit. I also think that once this affidavit is considered and once we have this testimony from Dr. Cruse, the presumption is in favor of the defendant and the burden falls on the State.

I am always hesitant to reach out to talk to jurors and I think if we're going to have a hearing and if you set down another hearing, I would suggest to the Court, because I think we're going to have competing interests reaching out in trying to find the rest of the jurors and talking to the jurors and investigating the other jurors, that the [8] Court simply take responsibility for getting the other sitting and deliberating jurors into a hearing without the State sending out folks to talk to them, us sending out folks to talk to them.

I mean, I'm agreeing that neither side, I'm suggesting, go out and try to talk to the jurors because I think with competing interests, State sending out somebody, us sending out somebody, these jurors are going to get, you know, they're going to get a feeling that they're being imposed upon.

THE COURT: All right. Anything else?

MR. HARVEY: No, sir.

MR. QUINN: If I may add, Your Honor, that Dr. Cruse did contact, and I'm not going to imply anything about defense counsel, but the timing is

kind of suspicious that apparently this affidavit was executed Thursday before the Monday of motion of trial hearing, so if he did, it is more than a year or almost a year after the trial. I think the timing is a little suspicious about that.

Regardless, this affidavit, we don't have the original here in the courtroom, it has not been tendered. It's apparently been filed in the clerk's office so I haven't laid eyes on the original affidavit and Your Honor hasn't and it has not been tendered into evidence.

The third point I want to make, Your Honor, and I have [10] understand that it came late and I understand their request to flesh this out and I understand Your Honor is going to schedule another hearing.

THE COURT: That's what the Court is going to do. We're going to schedule another hearing. As far as your recommendation, Mr. Harvey, I heard your recommendation. Both lawyers on both sides are officers of the court. Obviously you will conduct yourself accordingly.

The Court does not have the means or the mechanism to quote unquote go out and serve subpoenas to witnesses or potential jurors or jurors in this particular case or past jurors. I will allow the lawyers to subpoena, at the appropriate time, those individuals who they deem necessary but we at this point in time will have a hearing. Mr. Swindle, I will have him contact both sides and give you a date

certain. It will probably be outside of forty-five days, but you will have more than enough time to submit whatever written motions and/or briefs that you deem appropriate to support your respective positions.

I would like those filed prior to the date of the hearings so the Court can be aware of whatever positions you are taking so I can look at those cases in addition to whatever research we will do.

MR. HARVEY: All right. Judge, Mr. Henley was brought here on a writ to appear here. He's serving his sentence.

* * *

IN THE SUPERIOR COURT
OF DEKALB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	**CASE NO:**
Plaintiff	**06-CR-3288-5**
vs.	**MOTION FOR NEW TRIAL**
ANDRE HENLEY	
Defendant	(Filed Aug. 21, 2008)

* * *

The above-entitled matter came on for hearing in the Superior Court of DeKalb County, Decatur, Georgia, Tuesday, the 24th day of June, 2008; beginning and before the **HONORABLE GREGORY A. ADAMS**.

The following is a complete transcript of the proceeding reported by Kelly Carpenter, Official Court Reporter.

* * *

[16] THE COURT: All right. Based on the arguments that I have heard and my current under – my understanding, I'm going to deny the use of this affidavit for the purpose of impeaching this verdict.

What's the next issue, lawyers? Prepare an Order for my signature, Mr. Quinn.

What's the next issue. Are you ready for the actual motion for new trial, or do you just want me to consider the written brief that had been prepared?

MS. HENSON: I'll answer that first, Judge. We would ask for a continuance in order to bring Dr. Cruz.

THE COURT: Well, I don't even know if I'm going to allow him to testify even at a hearing. I don't think it rises to that level. So, what's the next issue?

MS. HENSON: That – that's our issue, Judge. However, I would ask – I would ask for an Order if the Court's not going to allow him to testify at the motion for new trial, I would ask for an Order to that effect so that we –

THE COURT: Well, this is a motion for new trial right now.

MS. HENSON: I understand that.

THE COURT: This case has been scheduled.

MS. HENSON: I understand that.

THE COURT: Call your witness.

[17] MS. HENSON: We don't have any witnesses, Judge.

THE COURT: All right. This has been docketed, this has been scheduled for a motion for new trial. The Court is giving you an opportunity. You can call your witness.

MS. HENSON: Judge, we would ask for a continuance –

THE COURT: Denied. Call your witness.

MS. HENSON: I have nothing, Judge.

THE COURT: All right. Anything else for this morning on this issue? On the original motion for new trial, are you in a position to go forward or what do you want to do, counselor?

MS. HENSON: Judge, we'll submit it on the motion brief.

THE COURT: What's the State's position?

MR. QUINN: That's fine, Your Honor. I've submitted a hearing brief that I think addresses all of the legal issues.

THE COURT: All right. All right, prepare that Order for my signature. I need an order within ten days. The Court will make a determination on the original motion for new trial and the supplemental motions within a reasonable period of time.

Any other matters for today?

MS. HENSON: No.

MR. QUINN: No, Your Honor.

* * *

SUPREME COURT OF GEORGIA

Case No. S09A0299 Atlanta, June 30, 2009

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

ANDRE SHANE HENLEY v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

Ga. Code Ann., § 16-5-1. Murder

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

(c) A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.

(d) A person convicted of the offense of murder shall be punished by death, by imprisonment for life without parole, or by imprisonment for life.

Ga. Code Ann., § 17-9-41. Jurors may sustain but not impeach verdict

The affidavits of jurors may be taken to sustain but not to impeach their verdict.

Ga. Code Ann., § 24-4-8. Number of witnesses necessary

The testimony of a single witness is generally sufficient to establish a fact. However, in certain cases, including prosecutions for treason, prosecutions for perjury, and felony cases where the only witness is an accomplice, the testimony of a single witness is not sufficient. Nevertheless, corroborating circumstances may dispense with the necessity for the testimony of a second witness, except in prosecutions for treason.

No. **06-CR_____**

DeKalb Superior Court

JULY Term, 2006

THE STATE

VERSUS

ANDRE S. HENLEY

D0176275-5

(Filed Jul. 13, 2006)

MURDER
FELONY MURDER
AGGRAVATED ASSAULT

TRUE *BILL.*

/s/ E. [Illegible] *Foreperson.*

The Defendant _____ *waives copy of Indictment, list of witnesses, full panel, formal arraignment, and pleads*

This the ___ *day of* _____ *20*__

_____

District Attorney

_____

Defendant's Attorney

_____

Defendant

BILL OF INDICTMENT

STATE OF GEORGIA, COUNTY OF DEKALB

IN THE SUPERIOR COURT OF SAID COUNTY,

THE GRAND JURORS selected, chosen and sworn for the County of DeKalb, to-wit:

1. Edward L. Jividen, Foreman
2. Herman Acosta
3. Lori G. Billingsley
4. Taunya R.T. Chaney
5. Horace Chester
6. Isadore Davis, Jr.
7. Gregory S. Everett
8. Alejandro Garcia
9. Amanda J. Gillot
10. Joann T. Griffin
11. Myra M. Jemison
12. Wilma D. Jenkins
13. Michael J. Lignos
14. Troy S. Meyers
15. Andrea E. Monroe
16. ~~Erica P. Morgan~~
17. Betty W. Ricks
18. Kadene E. Robinson
19. ~~Nichole M. Rodriquez~~
20. Veronica A. Sandiford
21. ~~Daniel G. Schwartzberg~~
22. Cynthia K. Shaner
23. ~~Christine C. Sharp~~
24. ~~Jamal Thomas~~
25. ~~Latonya M. Warren~~
26. David P. Williams

in the name and behalf of the citizens of Georgia, charge and accuse

ANDRE S. HENLEY

with the offense of:

MURDER

*for that said accused, in the County of DeKalb and State of Georgia, on the **7TH** day of **APRIL, 2006***

unlawfully and with malice aforethought, did kill, murder, and cause the death of Menes Kori Tripp, a human being, by shooting him the said Menes Kori Tripp with a handgun

***COUNT** TWO*

The GRAND JURORS, selected, chosen and sworn for the County of DeKalb, aforesaid, in the name and behalf of the citizens of Georgia, charge and accuse

ANDRE S. HENLEY

of the County and State aforesaid, with the offense of

FELONY MURDER

*for that the said accused in the County aforesaid, on the **7TH** day of **APRIL, 2006***

while in the commission of the offense of Aggravated Assault, did cause the death of Menes Kori Tripp, a human being, by shooting said Menes Kori Tripp with a handgun

***COUNT** THREE*

The GRAND JURORS, selected, chosen and sworn for the County of DeKalb, aforesaid, in the name and behalf of the citizens of Georgia, charge and accuse

ANDRE S. HENLEY

of the County and State aforesaid, with the offense of

AGGRAVATED ASSAULT

for that the said accused in the County aforesaid, on the ***7TH*** *day of* ***APRIL, 2006***

did make an assault on the person of Menes Kori Tripp, with a handgun, a deadly weapon

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IN THE SUPERIOR COURT FOR
THE COUNTY OF DEKALB
STATE OF GEORGIA

STATE OF GEORGIA	)	CRIMINAL ACTION FILE
VS.	)	NO. 06CR3288-5
ANDRE S. HENLEY, DEFENDANT	)	VOLUME V OF VI

* * *

TRANSCRIPT OF CRIMINAL TRIAL PROCEEDINGS IN THE ABOVE-CAPTIONED CASE, HELD BEFORE THE HONORABLE GREGORY A. ADAMS, SUPERIOR COURT JUDGE, IN THE SUPERIOR COURT OF DEKALB COUNTY, WITH A JURY, ON THE 2ND DAY OF MARCH, 2007, IN COURTROOM 5D OF THE DEKALB COUNTY COURTHOUSE, DECATUR, GEORGIA.

* * *

[926] MR. HARVEY: WELL, I KNOW IT IS THE PATTERN CHARGE, BUT, YES, I HAVE AN OBJECTION TO IT. I DON'T THINK – I THINK IT IS BURDEN SHIFTING. I THINK THE DEFINITIONS OF MALICE AFORETHOUGHT ARE VAGUE, AND I THINK THE DEFINITIONS OF – THERE ARE NO DEFINITIONS OF AN ABANDON AND MALIGNANT HEART. I THINK IT IS OUTDATED, OUT-MODED. THEY ARE IN VIOLATION OF DUE PROCESS. SO, YES, I WOULD OBJECT TO STATE'S REQUEST NO. 1.

THE COURT: ALL RIGHT. OBJECTION SO NOTED. WILL GIVE OVER OBJECTION.

NO. 2, DEFINITION OF MALICE.

MR. HARVEY: NO OBJECTION TO THAT. THAT'S THE CHARGE THE COURT –

THE COURT: I'M SORRY?

MR. HARVEY: NO OBJECTION.

THE COURT: ALL RIGHT. WILL GIVE.

NO. 3, PREMEDITATION.

MR. HARVEY: I HAVE NO OBJECTION.

THE COURT: WILL GIVE.

NO. 4, FELONY MURDER DEFINED.

MR. HARVEY: YES, I HAVE AN OBJECTION TO THAT. THE COURT: ALL RIGHT. YES, SIR.

MR. HARVEY: TO GIVING ANY CHARGE ON FELONY MURDER, I HAVE AN OBJECTION TO FELONY MURDER. SO I'M GOING TO OBJECT TO FELONY MURDER.

[927] THE COURT: ALL RIGHT. SO NOTED. WILL GIVE.

NO. 5. NOW, ON THE PROPOSED VERDICT FORM IT WILL BE LISTED HERE AS TO COUNT ONE, COUNT TWO. COUNT ONE WILL BE DEFINED – I MEAN AS FAR AS THEY WILL HAVE

AN OPTION, MALICE MURDER, FIRST OPTION IS NOT GUILTY, SECOND OPTION IS GUILTY. COUNT TWO, NOT GUILTY OPTION AND GUILTY OF FELONY MURDER. AND COUNT THREE, NOT GUILTY, AND GUILTY OF AGGRAVATED ASSAULT. THAT IS FORM OF THE VERDICT. ANY OBJECTION TO NO. 5?

MR. HARVEY: YES, I HAVE AN OBJECTION TO NO. 5, BECAUSE THERE IS ONLY ONE – THERE IS ONLY ONE ALLEGED MURDER IN THIS CASE. THEY CAN'T BE BOTH A MALICE MURDER AND FELONY MURDER, AND I DON'T HOW TO RESOLVE THE POTENTIAL *EDGE* PROBLEM. SO I OBJECT TO STATE'S REQUEST NO. 5.

THE COURT: MS. CONNORS, LET ME MAKE SURE. THIS IS OUT OF THE PATTERN BOOK, MS. CONNORS?

MS. CONNORS: YES. I BELIEVE THAT IT IS, JUDGE.

THE COURT: WELL, TELL ME THAT IT IS, DON'T TELL ME THAT YOU BELIEVE IT IS.

MS. CONNORS: NO, JUDGE, I PULLED THESE OFF OF OUR PATTERN CHARGES NOT OFF OF THE BOOK. I THINK THEY ARE CONSISTENT. BUT I WOULD ASK THE COURT IF THERE IS ANYTHING INCONSISTENT IN WHAT I HAVE SUBMITTED WITH WHAT THE PATTERN

CHARGE REQUIRES, THEN I WOULD ASK THE COURT TO GIVE THE PATTERN CHARGE.

* * *

[1035] WITHOUT JUSTIFICATION, EXCUSE, OR MITIGATION. IF A KILLING IS DONE WITH MALICE, NO MATTER HOW SHORT A TIME THE MALICIOUS INTENT MAY HAVE EXISTED, THEN KILLING CONSTITUTES MURDER.

GEORGIA LAW DOES NOT REQUIRE PREMEDITATION, AND NO PARTICULAR LENGTH OF TIME IS REQUIRED FOR MALICE TO BE GENERATED IN THE MIND OF A PERSON. IT MAY BE FORMED IN A MOMENT, AND INSTANTLY A MORTAL WOUND MAY BE INFLICTED. YET, IF MALICE IS IN THE MIND OF THE ACCUSED AT THE TIME OF THE DOING OF THE ACT OR KILLING, AND MOVES THE ACCUSED TO DO IT, SUCH IS SUFFICIENT TO CONSTITUTE THE HOMICIDE AS MURDER.

PROOF OF PARTICULAR MOTIVE IS NOT ESSENTIAL TO CONSTITUTE THE CRIME OF MURDER. EVIDENCE OF MOTIVE, IF ANY, IS ADMITTED FOR YOUR DETERMINATION AS TO WHETHER OR NOT IT ESTABLISHES THE STATE OF THE DEFENDANT'S MIND AT THE TIME OF THE ALLEGED HOMICIDE.

A PERSON ALSO COMMITS THE CRIME OF MURDER WHEN, IN THE COMMISSION OF A FELONY, THAT PERSON CAUSES THE DEATH OF

ANOTHER HUMAN BEING. UNDER THE LAWS OF GEORGIA, AGGRAVATED ASSAULT IS A FELONY AND IT IS DEFINED AS FOLLOWS: A PERSON COMMITS THE OFFENSE OF AGGRAVATED ASSAULT WHEN HE ASSAULTS ANOTHER PERSON WITH A DEADLY WEAPON. AN ASSAULT IS AN ATTEMPT TO COMMIT A VIOLENT INJURY TO THE PERSON OF ANOTHER.

[1036] A PERSON COMMITS THE OFFENSE OF AGGRAVATED ASSAULT WHEN THAT PERSON ASSAULTS ANOTHER PERSON WITH A DEADLY WEAPON. TO CONSTITUTE SUCH AN ASSAULT, ACTUAL INJURY TO THE ALLEGED VICTIM NEED NOT BE SHOWN. IT IS ONLY NECESSARY THAT THE EVIDENCE SHOW BEYOND A REASONABLE DOUBT THAT THE DEFENDANT ATTEMPTED TO CAUSE A VIOLENT INJURY TO THE ALLEGED VICTIM.

THE STATE MUST ALSO PROVE AS A MATERIAL ELEMENT OF AGGRAVATED ASSAULT, AS ALLEGED IN THIS CASE, THAT THE ASSAULT WAS MADE WITH A DEADLY WEAPON. A FIREARM, WHEN USED AS SUCH, IS A DEADLY WEAPON AS A MATTER OF LAW.

IN DECIDING WHETHER THE ALLEGED INSTRUMENT WAS A WEAPON CAPABLE OF CAUSING SERIOUS BODILY INJURY, YOU MAY CONSIDER DIRECT PROOF OF THE CHARACTER OF THE WEAPON, ANY EXHIBITION OF IT TO THE JURY, EVIDENCE OF THE NATURE OF ANY WOUND OR ABSENCE OF A WOUND, OR ANY

OTHER EVIDENCE OF THE CAPABILITIES OF THE INSTRUMENT.

NOW, AN AFFIRMATIVE DEFENSE IS A DEFENSE THAT ADMITS THE DOING OF THE ACT CHARGED BUT SEEKS TO JUSTIFY, EXCUSE, OR MITIGATE IT. ONCE THE ISSUE OF AN AFFIRMATIVE DEFENSE IS RAISED, THE BURDEN IS ON THE STATE TO DISPROVE IT BEYOND A REASONABLE DOUBT.

THE FACT THAT A PERSON'S CONDUCT IS JUSTIFIED IS A DEFENSE TO PROSECUTION FOR ANY CRIME BASED ON THAT CONDUCT. THE DEFENSE OF JUSTIFICATION CAN BE CLAIMED WHEN THE

* * *

STATE OF GEORGIA
COUNTY OF FULTON

AFFIDAVIT OF DR. FRANCISCO CRUZ

COMES NOW, the undersigned, after being duly sworn, and under penalty of perjury, states the following:

1. My name is Dr. Francisco Cruz, and I am of sound mind and over twenty-one years of age.

2. I was impaneled as a juror in the trial of *State of Georgia v. Andre Henley*, DeKalb County Superior Court Case No. 06SC3288.

3. The initial vote during deliberations resulted in a six to six split.

4. As of Friday, the first full day of deliberations, the final vote was eight votes to acquit, four votes to convict.

5. On Monday, we began to deliberate again.

6. A central issue during our deliberations was the belief of some jurors that the State had failed to prove the connection of Mr. Henley to the nickname "Blood."

7. A second central issue was the belief of some jurors that the State had failed to prove a connection between Mr. Henley and a green Honda Accord with a dealer plate.

8. Largely because of the two failures noted herein, I had a reasonable doubt as to

whether Mr. Henley was the perpetrator of the murder.

9. Based on the deliberations at the time, many jurors shared my doubt based on the same factors.

10. On Monday March 5, 2008, the day before the final day of deliberations, one or more of the jurors informed the group that they had seen Mr. Henley driving a green Honda Accord with a dealer plate near the courthouse.

11. Another one or more jurors informed the group that (s)he had overheard someone refer to Mr. Henley in the hallway as "Blood" and that Mr. Henley responded to that moniker.

12. Shortly thereafter, all eight of the jurors, including myself, who had previously voted to acquit Mr. Henley changed their votes to "guilty."

13. But for the additional information referred to in Paragraphs 10 and 11, my vote would have remained "not guilty."

FURTHER AFFIANT SAYETH NOT.

/s/ Francisco Cruz
DR. FRANCISCO CRUZ

Sworn to and subscribed before me
this 7th day of February, 2008.

/s/ Joy Geske
NOTARY PUBLIC